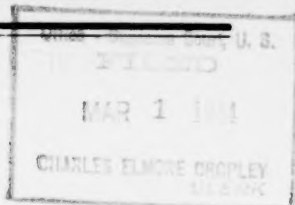


✓ JOG-LUK



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 748

JOGGER MANUFACTURING CORPORATION,
Petitioner-Plaintiff,
vs.

WENDELL H. ROQUEMORE, DOING BUSINESS AS
MULTIGRAPH SALES AGENCY,
Respondent-Defendant.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE SEVENTH CIRCUIT AND
BRIEF IN SUPPORT THEREOF.**

HOWARD D. MOSES,
Counsel for Petitioner.

CHARLES G. CULVER,
Of Counsel.



1128/46 Supreme Court - 1898

143957

750841

INDEX.

PAGE

PETITION FOR WRIT OF CERTIORARI.

Summary statement of the matter involved.....	1
Jurisdiction	4
Question presented	5
Reason relied on for allowance of the Writ.....	6

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the courts below.....	7
Jurisdiction	7
Statement of the case.....	7
Specification of errors.....	7
Summary of argument.....	8
Argument	9

Point I. The deliberate disregard of the fundamental legal principles applicable to the construction of ambiguous contracts, and the refusal by the Circuit Court of Appeals to subsequently allow fraudulently suppressed evidence to become a part of the record to aid in the construction of the contract in question is such an unfair and prejudicial departure from the accepted and usual course of judicial proceedings, and in such complete disregard of established law by that court as to demand the exercise of the supervisory power of this court to prevent a gross miscarriage of justice 9

Point I-A. When two courts hold to opposite views in an attempt to construe a written instrument, the language out of which such difference of opinion arises is ambiguous..... 10

Point I-B. By reason of the doubt arising as to the true sense and meaning of the words employed, the sense and meaning of the language will be investigated and ascertained by evidence dehors the instrument, and the court in order to place itself as nearly as possible in the situation of the parties at the time will consider all the facts and circumstances leading up to and attending the execution of the contract	11
Point I-C. The Circuit Court of Appeals, having predicated its decision upon a misapprehension of the true facts, there was imposed upon petitioner's former counsel the duty to advise that court of the existence of the evidence which would destroy the court's misapprehension of the truth, and the suppression of the truth by petitioner's former counsel was as reprehensible as the utterance of the false	13
Point I-D. The petitioner having been prevented from presenting all of its case to the court by fraud practiced upon it, the Circuit Court of Appeals abused its discretion by denying petitioner's petition for permission to make application to the District Court for leave to file a bill in the nature of a Bill of Review.....	14
Point I-E. The petitioner has not been guilty of laches in asserting its rights.....	16
Point I-F. It is within the power of this court to direct the remandment of this case to the Circuit Court of Appeals with directions to grant permission to petitioner to make application to the District Court for leave to file the proposed Bill in the nature of a Bill of Review....	17
Conclusion	20
Motion for leave to use the certified transcript of record in Case No. 90, October Term 1940, of this court, in lieu of supplying an additional certified transcript of proceedings to that date.....	21

	PAGE
CASES CITED.	
Ballard v. Searls, 130 U. S. 50.....	5, 17
Board of Education v. City of Rockford, 373 Ill. 442	12
Close v. Browne, 230 Ill. 228.....	12
Copper Process Co. v. Chicago Bonding & Insurance Co., 262 Fed. 66.....	13
Corbett v. Winston Elkhorn Coal Co., 296 Fed. 577....	12
Des Moines Terminal Co. v. Des Moines Ry. Co., 52 Fed. 2nd 616.....	16
Deweese v. Smith, 106 Fed. 438.....	15
Doyle, et al., v. Teas, et al., 4 Scammon (Ill.) 202....	11
Fiske, et al., v. Buder, 125 Fed. 2nd 841.....	15
General Supply Co. v. Marden, Orth & Hastings Co., 276 Fed. 786.....	12
Hatch v. Ferguson, 57 Fed. 966.....	15
Hayes v. O'Brien, 149 Ill. 403.....	12
Hedrick v. Donovan, 248 Ill. 479.....	12
Higinbotham v. Blair, 308 Ill. 568.....	12
Kershaw, et al., v. Julien, 72 Fed. 2nd 528.....	20
King v. McAndrews, 111 Fed. 860.....	15
LeMarchel v. Teagarden, 152 Fed. 662.....	15
Levy v. Arredondo, 12 Pet. 218.....	17
Lock Joint Pipe Co. v. Melber, 234 Fed. 319.....	10
Marshall v. Holmes, 141 U. S. 590.....	15
Marx v. American Malting Co., 169 Fed. 582.....	12
Miller v. Perris Irrigation Dist., 85 Fed. 693.....	15
Nelson v. Colgrove & Co. State Bank, 354 Ill. 408.....	12

CASES CITED (Continued).

Nelson v. Meehan, 155 Fed. 1.....	15
O'Brien v. Wheelock, 184 U. S. 450.....	16
Pacific RR. of Missouri v. Missouri Pacific RR. Co., 110 U. S. 504.....	15
People v. Case, 241 Ill. 279.....	13
People v. Chamberlain, 242 Ill. 260.....	13
People v. Moutray, 166 Ill. 360.....	13
People v. Payson, 215 Ill. 476.....	13
Ransom v. City of Pierre, 101 Fed. 665.....	5
Riverside Oil & Refining Co. v. Dudley, 33 Fed. 2nd 749	15
Ryan v. Ohmer, 244 Fed. 31.....	12
Stewart v. Wyoming Cattle Rancho Co., 128 U. S. 383	14
Truly v. Wanzer, 5 How. 141.....	15
Tyler v. Savage, 143 U. S. 79.....	14
United States v. Newman, et al., 25 Fed. 2nd 357.....	13
United States v. Throckmorton, 98 U. S. 61.....	5, 14
Vance v. Burbank, 101 U. S. 514.....	15
Weber v. Adler, 311 Ill. 547.....	12

RULES AND STATUTES CITED.

Rule 38 of the Rules of the United States Supreme Court	1
Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (8 F.C.A., Title 28, Sec. 347)	4
Section 8 of the Act of February 13, 1925 (8 F.C.A., Title 28, Sec. 350).....	5

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No.

JOGGER MANUFACTURING CORPORATION,
Petitioner-Plaintiff,
vs.

WENDELL H. ROQUEMORE, DOING BUSINESS AS
MULTIGRAPH SALES AGENCY,
Respondent-Defendant.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE SEVENTH CIRCUIT.**

*To the Honorable the Chief Justice and Associate
Justices of the Supreme Court of the United States:*

Jogger Manufacturing Corporation, petitioner, prays that a Writ of Certiorari issue to review the order of the United States Circuit Court of Appeals for the Seventh Circuit, entered December 1, 1943 (Supp. Rec. 131).

In accordance with Rule 38 of the rules of this court, a certified transcript of the original record and supplemental record in the case, including the proceedings in the Circuit Court of Appeals is furnished herewith.

Summary Statement of the Matter Involved.

Petitioner originally instituted suit for infringement of its Letters Patent No. 1694638 and 1863465, issued upon a

paper stacking device known as a jogger. The defendant, respondent here, defended upon the ground of a license granted the American Multigraph Company, August 10, 1931, and also that the accused device did not infringe petitioner's patents. Trial was had in the United States District Court for the Northern District of Illinois, Eastern Division. Validity of the patents was not contested.

The trial court ruled that the license contract (Rec. 191-4, Rec. 56) was clear and unambiguous and licensed the manufacture of only two sizes of petitioner's device specifically mentioned in the contract (Rec. 205); a decree finding infringement and awarding petitioner an injunction and accounting of profits and damages was thereafter entered (Rec. 214).

Respondent in his Designation of Record included defendant's exhibits 8, 9, 10 and 11 (Rec. 223). Thereafter former counsel for petitioner stipulated to delete these exhibits from the record on appeal. These exhibits are blue prints of the No. 112 and No. 1121 joggers licensed to American Multigraph Company (Orig. Rec. 147, Supp. Rec. 90-91, 120-123).

On appeal, the United States Circuit Court of Appeals, Seventh Circuit, ruled that the aforementioned license agreement licensed American Multigraph Company and its successor to make, use and sell any sized jogger it saw fit to apply to any device it might make. That court also found that certain features of the accused device were not infringements of petitioner's patents. The decree of the District Court was reversed with directions to dismiss the suit (118 Fed. 2nd 867).

The decision of the Circuit Court of Appeals was rendered March 6, 1941, and rehearing denied April 14, 1941. Petition for Writ of Certiorari was filed in this court to the October 1940 Term, and said petition was denied October 13, 1941. The mandate was filed in the District Court on July 18, 1942.

On December 3, 1942, petitioner made application to the Circuit Court of Appeals, Seventh Circuit, for permission to apply to the District Court for leave to file a Bill of Review upon the ground of newly discovered evidence and also upon the ground of perjury committed by the defendant's witnesses upon matters material to the issues in the case (Supp. Rec. 2-27). Petitioner's application was denied February 3, 1943 (Supp. Rec. 50), and a motion to vacate said order was denied on the 15th day of February, 1943 (Supp. Rec. 55).

On the 6th day of August, 1943, petitioner filed its Amended Petition for permission to make application to the United States District Court for leave to file a Bill in the nature of a Bill of Review. The original petition was made a part of the Amended Petition by reference and was predicated upon a proposed complaint, sworn to, and attached to the petition as a part thereof (Supp. Rec. 57-123).

The grounds upon which relief was sought in the proposed complaint were:

1. That the Circuit Court of Appeals based its opinion upon a misapprehension of the facts; and that there was in existence a series of correspondence and other documentary evidence which completely refuted all findings of fact made by the United States Circuit Court of Appeals.
2. That said evidence was in the possession of petitioner's former counsel; that said counsel refused to advise the Circuit Court of Appeals of its existence after the rendition of its original decision on March 6, 1941 (Supp. Rec. 101).
3. That unknown to petitioner, said former counsel had stipulated to delete from the record exhibits which would have proven the findings of fact indulged in by the United States Circuit Court of Appeals to be without foundation in fact since said exhibits would have estopped respondent

from asserting certain differentiating elements in the accused devices as being outside of the claims of petitioner's patents (Supp. Rec. 90-91).

4. That the deletions of the record and the refusal of counsel to present the suppressed evidence as requested were a fraud upon the rights of petitioner and a fraud upon the court.

5. That petitioner did not recover back the withheld documentary evidence until the Spring of 1942; that other counsel was immediately retained and after an exhaustive investigation covering several months, application was made to the United States Circuit Court of Appeals; that the petitioner had been diligent at all times in an effort to protect its interests (Supp. Rec. 102).

6. That the import of the withheld evidence was to prove conclusively that the previous decision of the Circuit Court of Appeals was not founded on the facts. Its further import was to estop the respondent from asserting the alleged differentiating elements upon the ground that each of the alleged differentiating elements were embodied in the joggers numbered 112 and 1121 by petitioner before and at the time of the execution of the license contract of August 10, 1931, and were within the contemplation of the parties at the time of the execution of said license contract.

The United States Circuit Court of Appeals denied the prayer of petitioner's Amended Petition for permission to make application to the District Court for leave to file a Bill of Review on December 1, 1943, without rendering an opinion in support of its order (Supp. Rec. 131).

Jurisdiction.

1. Consideration of this matter is vested in this court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (8 F.C.A., Title 28, Section 347).

2. The date of the order which petitioner seeks to review is December 1, 1943 (Supp. Rec. 131).

3. This Petition for a Writ of Certiorari is presented to this court within three months from December 1, 1943, as prescribed by Section 8 of the Act of February 13, 1925 (8 F.C.A., Title 28, Section 350).

We believe the action of the United States Circuit Court of Appeals, Seventh Circuit, to be in conflict with *Levy v. Arredondo*, 12 Pet. 218, 9 L. Ed. 1062; *U. S. v. Throckmorton*, 98 U. S. 61; 25 L. Ed. 93; *Ballard v. Searls*, 130 U. S. 50, 9 S. Ct. 418, 32 L. Ed. 846; *Marshall v. Holmes*, 141 U. S. 590, 12 S. Ct. 62, 35 L. Ed. 870; *Ransom v. City of Pierre*, 101 Fed. 665.

4. The original suit was instituted for infringement of petitioner's Letters Patent. The order of the Circuit Court of Appeals entered December 1, 1943, completely and finally disposes of any rights remaining to petitioner to seek redress. The finality of the order is of such character as to be cognizable by this court.

Question Presented.

When it is brought to the attention of a Circuit Court of Appeals that a gross miscarriage of justice has been perpetrated by its previous decision which was based upon a misapprehension of the facts and a misuse by that court of its right to construe a contract, which by the very nature of its interpretation is rendered ambiguous, and further that the true facts had been withheld from the court by the unauthorized, wilful and fraudulent conduct of the aggrieved party's former counsel, is it an abuse of discretion for the Circuit Court of Appeals to deny permission to the aggrieved party to make application to the District Court for leave to file a Bill in the nature of a Bill of Review for the purpose of introducing into the record the suppressed evidence?

Reason Relied On for Allowance of the Writ.

The deliberate disregard of the fundamental legal principles applicable to the construction of ambiguous contracts, and the refusal by the Circuit Court of Appeals to subsequently allow fraudulently suppressed evidence to become a part of the record to aid in the construction of the contract in question is such an unfair and prejudicial departure from the accepted and usual course of judicial proceedings, and in such complete disregard of established law by that court as to demand the exercise of the supervisory power of this court.

WHEREFORE, it is respectfully submitted that the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit should be granted.

JOGGER MANUFACTURING CORPORATION

By HOWARD D. MOSES and CHARLES G. CULVER,
Counsel for Petitioner.

